No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Brief of Appellant

SMITH, MAHAN & SMITH
Helena, Montana
HOWARD TOOLE
Missoula, Montana
W. E. MOORE
Missoula, Montana

Attorneys for Appellant.

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CASES CITED

CASES CITED—*(Continued)*

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STATEMENT OF THE CASE

In this action, brought upon a policy of War Risk insurance, the appellant, Harry D. McCleary, hereinafter referred to as the plaintiff, prosecutes his appeal to this court from a directed verdict for the appellee, United States of America, hereinafter referrd to as the defendant.

The plaintiff commenced his action on April 26, 1932, for recovery of the total and permanent disability benefits under his policy of War Risk insurance, issued in the sum of $10,000.00 while serving in the United States army. It is alleged in paragraph IV of his complaint that he was totally and permanently disabled at the time of his discharge, to-wit, the 9th day of May, 1919, by reason of having been gassed and afflicted with influenza, with a resultant pulmonary tuberculosis. (R. 4). By its answer, the defendant admits the issuance of the policy of War Risk insurance in the sum of $10,000.00, on November 16, 1917, and that the premiums were paid thereon, to and including the month of May, 1919, and alleges that said insurance lapsed for non-payment of premiums on the 1st day of July, 1919, but denies the allegation of total and permanent disability. (R. 8). The simple issue framed by these pleadings is whether or not the plaintiff was in fact totally and perman-

ently disabled at or prior to midnight of June 30, 1919, the expiration of the grace period under the policy herein sued upon.

Upon the trial of this case the plaintiff adduced substantial evidence, as disclosed by the record, indicating that he was totally and permanently disabled on or before the date of his discharge from the service, and in consonance with such evidence, the court denied *pro forma* defendant's motion for a directed verdict, made at the conclusion of the plaintiff's case, on the ground that the evidence was insufficient to make a prima facie case for the plaintiff and to show total and permanent disability (R. 56), whereupon the defendant adduced its evidence, altogether documentary, consisting of alleged records of plaintiff's condition, physically, kept by the Veterans' Administration, with the exception of possibly expert testimony; it is undenied in the record that the plaintiff has been totally and permanently disabled from active pulmonary tuberculosis since March, 1932, which makes the issue herein as to whether or not plaintiff has been totally and permanently disabled from June 30, 1919, to March, 1932. Notwithstanding this fact, the court granted the defendant's motion for a directed verdict, made upon the same grounds as before, to-wit, that the evidence was insufficient to show total and permanent disability while the policy was in force

(R. 14), and it is from this directed verdict that plaintiff appeals to this court.

The assignments of error, raising the questions that the court erred in admitting certain documentary evidence and in directing the verdict for the defendant, are as follows:

ASSIGNMENTS OF ERROR

I.

That the District Court erred in granting defendant's motion for a directed verdict, made at the close of all the testimony, the granting of which motion was duly excepted to at the time.

II.

That the District Court erred in directing the verdict for the defendant, to which error the plaintiff took due and timely exception.

III.

That the District Court erred in receiving and filing the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

IV.

That the District Court erred in entering judgment upon the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

V.

That the District Court erred in admitting certain documentary evidence, to which error the plaintiff took due and timely exception.

VI.

That the District Court erred in refusing to admit certain opinion evidence, to which error the plaintiff took due and timely exception.

ARGUMENT

A. Plaintiff's evidence and all reasonable inferences therefrom must be considered most favorable to him.

The right to a trial by a jury was made a part of our Constitution by the Bill of Rights, incorporated into the Constitution as amended, even before the adoption of the Constitution by the original 13 states.

This amendment provides in part as follows:

> "In suits at common law * * * the right of trial by jury shall be preserved * * * "

In interpreting this amendment, the courts have uniformly held that if there is any substantial evidence then the case must be submitted to the jury; and this court has said:

> "The right to a trial by jury is guaranteed by the Constitution and it is not to be denied except in a clear case. The * * * decisions * * * have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue to which the jury might properly give credence, the court is not authorized to instruct the jury to find a verdict in opposition thereto." *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.*, 220 *Fed.* 600.

And Judge Gilbert, speaking for this court, has said

> "And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant it is for the jury to determine what facts are established, even if their verdict is against the decided preponderance of the evidence." (Cases cited). *U. S. Fidelity and Guaranty Co. v. Blake*, 285 *Fed.* 449.

And on motion for a directed verdict the evidence and all reasonable inferences therefrom shall be construed most strongly against the party making the motion. See *U. S. v. Meserve*, 44 *Fed.* (2*d*), 549.

> "The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear but is also entitled to the benefit of such reasonable inferences as arise out of the facts proved." *U. S. v. Meserve.*

Or, again,

> "But upon a motion for a directed verdict the court was bound to accept the testimony most favorable to the plaintiff." *Port Angeles Western R. Co. v. Tomas*, 36 *Fed.* (2*d*) 210.

For a recent study of this question as it relates to War Risk insurance actions, see U. S. v. Burke, 50 Fed. (2d) 653, and also Sorvik v. U. S., 52 Fed. (2d) 406.

In view of the settled law it becomes necessary to briefly summarize the evidence to ascertain whether or not there was any substantial evidence to support a verdict in this case, had one been returned for the plaintiff, and unless this court can say from the record that there is no evidence, or no reasonable inference from the evidence, that the plaintiff was totally and permanently disabled, then this case must be reversed and remanded for a new trial. See U. S. Fidelity & Guaranty Co. v. Blake, 285 Fed. 449.

B. There was substantial evidence of total and permanent disability to require submission of the case to jury.

Plaintiff testified in his own behalf: I was gassed in the Argonne October 26, 1918, by inhalation. I had influenza, after having been taken to the hospital and was hospitalized five months. Was underweight,

had night sweats and run a temperature all the time. (R. 14).

From the date of my discharge (May 9, 1919), I was home at Twin Falls, Idaho, about a year, sick all the time and not able to do anything. I felt weak and did not have any energy; my joints bothered me; I had a cough and chest pains; spit up a lot of sputum all the time and was treated during this period by Dr. Duncan Alexander, Twin Falls, Idaho, for about three months. After getting out of bed I didn't do anything. The first I did, or attempted to do after the war was vocational training, beginning December, 1920. Took bookkeeping and accounting 8 or 9 months. During that time I coughed a lot, was weak, underweight, and didn't have energy to do anything. Did not attend school regularly. Was sick and feverish and felt that way. Didn't get along in training. Left training at that time because the government discontinued it on account of my physical condition. After leaving training went home and stayed four months and did nothing, because I was sick. I coughed, had night sweats, ran a temperature. I was that way all of that period. (R. 15-16).

Next I went to Spokane, Washington; took display work in vocational training. Was there 8 or 9 months, during which time I had night sweats, coughed a lot,

did not work regularly on account of physical condition. Left Spokane and went to California to benefit my health. Worked at San Jose, California, show card writing off and on about a year. Did not work regularly. During all this time I had night sweats, coughed, temperature, underweight. Quit job after 8 or 9 months on account of physical condition. Went to San Francisco; did not attempt to work for several months, then attempted to work for Pomin Corset Co. writing cards and doing a little display work. The work was very light. Pomin knew my condition. I took my time in doing work and that is the way I got by with my job. If I had been a healthy person could have done the work in about one-third of the time. While working was underweight, coughed, spit up bad suptum. Quit that job and rested for several months, because I was sick and had the same symptoms I have already related. Mr. Pomin, my boss, was to come here as a witness but he died two years ago. (R. 16-17).

Next worked at Hale Bros., San Francisco. Show card work. Did not work steadily. Worked off and on because I was sick, had coughs, night sweats, temperature all the time. Left Hale Bros. and was sick at home. Several months later Hale Bros. gave me a lighter job selling radios in the radio department. Followed that for about three months. Couldn't stay with

it longer, had to quit on account of physical condition. Haven't done any work since then. (R. 17-18).

I was first advised in 1920 that I had tuberculosis, and was instructed as to how to take care of myself. I was able to get along because I had help from my father-in-law, W. E. Moore, my own family, and the government. (R. 18).

Since leaving Hale Bros. employ have been in the hospital most of the time. The government has rated me as permanently and totally disabled for pulmonary tuberculosis. There is a way to tell when you have that disease; I didn't have any trouble knowing I had it at all. I have it; cough a lot, spit up bad sputum and blood, sometimes, and have night sweats all the time and run a temperature. (R. 18-19).

Since my discharge (May 9, 1919), I have not been free from temperatures and pain condition in the chest. Dr. Alexander tapped by left lung in 1920 and took out fluid. (R. 19).

I was examined in a way when I was discharged from the army. Was run through a line with one doctor here and there. They tapped me on the chest, on the knees, and that was the end of it. The examination consumed maybe two minutes. (R. 25).

I was not returned to duty from the time I was in

the hospital for gas and influenza before I was discharged .(R. 26). I was rated totally disabled by the government in 1920, but not permanently so. (R. 26). After 1920 the next time I was under observation by government doctors was in 1930. (R. 27).

The witness, in testifying regarding the alleged documentary reports of a physical examination, from which witness was cross examined, said: None of those tests were made of me in any of these examinations. Examinations made of me while I was in training consisted of questioning and maybe sounding with a stethoscope. (R. 27).

Plaintiff's testimony was corroborated in the following particulars by Josephine McCleary, his wife: We were married July 12, 1923. At the time I was married I knew that my husband had been gassed. I knew that he had been taking training. I noticed that he coughed almost constantly. After we were married I noticed his health was not good. The second week after we were married, he went to work; I noticed he coughed most constantly, especially at night. Didn't seem natural or normal. He would get feverish and irritable. I am living with him now. He has the constant cough, which brings up a lot of sputum sometimes. I noticed the same symptoms right after we were married. I noticed that he coughed so much at

nights. He didn't get his breath and often was not able to go to work. I also observed night sweats right away after we were married. He seemed to be driving himself in everything that he did. He has not been well or normal since we have been married. (R. 28, 29, 30).

Dr. Duncan L. Alexander, Twin Falls, Idaho, testified: I have had plaintiff under my professional care. My first record of examination was May 16, 1920. Following that he was under my care to July 19, 1920. When first examining plaintiff, I found him suffering from cough, purulent expectoration, temperature. He was bedridden from May 22 to June 12. Examined several specimens of sputum myself and had two specimens examined at Dr. Hal Bieler's laboratory, the sputum in all cases being negative for tubercular organisms, but continued staphylococci and streptococci. May 25, 1920, a Widal aglutination blood test was done by the same laboratory for typhoid fever. Found negative. June 2nd, punctured the plural cavity and withdrew a large amount of clear yellow fluid. Symptoms were fever, continued coughing, with expectoration purulent, pain in the chest, difficulty with respiration. There was a dullness in one of the lungs. Made clinical diagnosis without the bacteriological findings of tubercular infection. Condition was very active. (R. 33, 34, 35).

In making the diagnosis I took into consideration the history of the case. (Rr. 38). Sometimes the history is of the utmost importance. In fact, more important than the clinical findings. Negative sputum for tuberculosis bacilli does not mean that a patient does not have tuberculosis. In my judgment, the symptoms which I related are ordinarily found in active tuberculosis cases. (R. 39). I found rales in this man; they were over the apices, in fact general over the chest. (R. 40).

The witness, Mrs. E. N. McCleary, mother of plaintiff, testified: I was where he was at the time he enlisted in the army. I saw him when he returned home in May, 1919. I certainly noticed a difference in his appearance than when I last saw him before he went away. He went away a perfect specimen of young manhood, and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk. He didn't have any pep and he had pains in his chest and was very sick in the spring of 1920. I took care of him when Dr. Alexander was treating him. He was bedfast two months. Dr. Alexander told me his sickness had been caused from gas. His appearance has improved now over what it was when he first got out of the army. (R. 40, 41, 42).

Dr. G. D. Waller testified: I am a practicing phy-

sician and surgeon, employed by the U. S. Veterans Administration. I made a physical examination of plaintiff in March, 1932, in conjunction with a board of three. The report of the examination made by me is dated March 18, 1932. Plaintiff was suffering from far advanced active tuberculosis and chronic pleurisy of both lungs. The disability is permanent and total. (R. 43). It is not necessary that a sputum test be positive for tubercular bacilli to establish active pulmonary tuberculosis. The diagnosis (referring to Dr. Alexander's diagnosis on clinical findings and history) would be doubtful, to a certain extent, but pleurisy with effusion, the vast majority of cases are tubercular. (R. 44-45). It is possible, with active pulmonary tuberculosis for a man to work; from a medical standpoint it is not advisable, for it would be detrimental to the patient's health; this would be true because exhaustion and worry are two of the worst things that can happen to a tuberculosis patient. (R. 45).

Dr. James D. Hobson testified: I am a physician and surgeon and a designated examiner of the Veterans Administration and have represented the Veterans Bureau since 1919. I examined the plaintiff first some months ago. He had fibrosis tuberculosis active. His sputum contains more tubercular bacilli than any case I have ever seen. They just come forth in showers.

He is totally disabled. It is reasonably certain that he will continue totally disabled the remainder of his life. Many times I have made a diagnosis of active tuberculosis on clinical findings and history alone. I have heard the findings upon which Dr. Alexander based his diagnosis; I would say that in all probability he (plaintiff) had a tubercular pleurisy with effusion, in 1920. (R. 47, 48, 49).

Taking into consideration the condition I found when I first examined him, I think the plaintiff has probably been continuously active since 1920. The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, impaired resonance with rales, and positive sputum. If McCleary had all those symptoms, with the exception of positive sputum, during any period of time, considering his history of influenza, and his history of pleurisy with effusion, I consider that he has been active since that time for the reason that a great many cases of tuberculosis show a severe influenza with pro-bronchial involvement. It is entirely possible for one with tuberculosis to work or follow an occupation, even with active tuberculosis. It would, however, very much endanger his life to do so. (R. 50). The less work a man does, the more likely he is to be cured, because I consider tuberculosis as a fire that is burning; he has to use all of his resources to

put it out. If he is worried, or has to work hard, of course a lot of his energy is going some place where it is misdirected. (R. 53).

In contradiction of plaintiff's evidence, and to disprove that he became totally and permanently disabled before June 30, 1919, defendant called one witness, and introduced into evidence, over plaintiff's objection, defendant's Exhibit 1. (R. 59). In this document, which purports to be the report of a physical examination in plaintiff's file with the Veterans Administration, under date of June 19, 1920, it is stated that plaintiff "has a vocational handicap which is major." (R. 64).

Also admitted, over objection, defendant's Exhibits 7 (R. 87) and 8. (R. 92). Number 7 is an alleged report of a physical examination made by an alleged doctor, one M. J. Seid, under date of May 23, 1924. It will be noted that the plaintiff testified that all examinations made of him between 1920 and 1930 by government examiners were superficial and that none of them covered any period of observation. (R. 27). The alleged reports of examinations admitted as exhibits do not reveal anything to the contrary.

Defendant's Exhibit 8 is an alleged examination report of Drs. J. G. Hepplewhef and Jos. S. Hart, dated September 18, 1924. There was nothing in this alleged

examination to indicate that it was more than a superficial one, or to disprove plaintiff's testimony regardiny it.

Defendant's Exhibit 2 was an application by plaintiff for compensation, on government form 526, and was received in evidence without objection. It was dated June 18, 1920, and in his application plaintiff claimed trouble with lungs, and the cause of disability, gas, influenza and exposure. (R. 65-66).

Defendant's Exhibit 3 was received in evidence without objection and was plaintiff's certificate of discharge. It had plaintiff's physical condition, when discharged, marked as "good." (R. 71-72). Plaintiff testified regarding this that the examination given him at date of discharge was superficial and consumed about two minutes; that he had not been returned to duty after being discharged from the hospital in the army, and went home sick. (R. 25-26). This is corroborated by the testimony of his mother, Mrs. E. M. McCleary. (R. 41).

Defendant's Exhibit 5 was received in evidence without objection and is an alleged report of a physical examination by an alleged C. H. Sprague of Pocatello, Idaho, dated December 10, 1921. This instrument reveals a diagnosis of tuberculosis chronic, pulmonary, which had been crossed out. (R. 76, 81,

83). The cancellation of the diagnosis is explained in part on the exhibit by a letter directed to Dr. Sprague, and signed by Paul I. Carter, Surgeon, USPHS, in which letter it is stated "The evidence, as submitted, is insufficient for this diagnosis, and you are requested to make the necessary correction and expedite the return of the examination to this office." (R. 84). The first endorsement on said exhibit and signed by Dr. Sprague reveals that he obeyed the command of his superior and changed his diagnosis, with this statement: "You will note corrections made as per your request." (R. 85). It is clear that Dr. Sprague, having supposedly examined this man, knew more about his condition and could better classify his disability than his superior, whom, the record reveals, never had examined the plaintiff. This should throw some light upon the value to be given to these alleged examination reports as evidence.

Defendant's Exhibit 6 was received in evidence without objection, and merely states that on September 3, 1924, plaintiff was suffering with pleurisy and rheumatism. (R. 85).

Defendant's only witness identified these exhibits. These documents are from the file of plaintiff kept by the Veterans Administration. Other than giving some alleged expert testimony with reference to the disabling

results of tuberculosis, the defendant had no further evidence.

The learned trial judge clearly reveals the theory upon which the directed verdict for the defendant was given in this language:

> "The burden of proof is upon the plaintiff; if his evidence leaves it a mere matter of speculation as to the permanency of his total disability in May, 1919, he cannot recover."

In using this language, the learned trial court was quoting from a decision in the case of Nicolay v. U. S., 51 Fed. (2) 170. (R. 112).

The trial court, in directing the verdict for the defendant, further used this language:

> "Let us concede, let it be granted, that he had tuberculosis when he left the army and when he quit paying premiums, on the first of July, 1919, —although there is no evidence by anyone that he actually had it until a year later, by Dr. Alexander,—there is no evidence that if he had been given the proper care, rest, treatment, at that time, that his case was not a curable one, and if that is so it is not a case of permanent disability, however total it might have been." (R. 112).

It is clear from the above language that the learned court was of the opinion that because tuberculosis is

classified as a curable disease, and that there was no positive testimony in the record for plaintiff that his disease of tuberculosis had reached a state, in 1919, so that it could be, at that time, classified as incurable; plaintiff is now unable to recover. We submit that such a rule would preclude the recovery on any policy where the insured was suffering from tuberculosis, unless the insured died before the policy lapsed for non-payment of premiums, or that he had suffered from active tuberculosis for a period of years before the lapsation of said policy, which would be impossible for a veteran of the World War to show, for the reason that if he had been suffering from tuberculosis he could not have been accepted into the army.

We further submit that such a rule is contrary to the recognized rules of this court. Even the learned trial court, in taking this view, disregarded his own opinion in the early case of McGovern v. U. S., 294 Fed. 108, wherein he stated:

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence." *McGovern v. U. S.*

We submit that the foregoing quotation is a correct statement of the law. The court's ruling here denies

the liberal construction of the War Risk Insurance Act to which the insured has been held by all the courts to be entitled.

This court said, in Sorvik v. U. S., 52 Fed. (2) 406:

> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans Act (38 U. S. C. A., par. 421, et seq.), which the courts have repeatedly held should be liberally construed in favor of the veteran."

In McNally v. U. S., 52 Fed. (2d) 440, the Eighth Circuit Court of Appeals construed a like problem, involving the permanency of a total disability, and said:

> "It is not necessary to show that prior to September 30th, 1919, a reasonable certainty existed that the disability was permanent. It must appear at some time prior to the determination of the case that the disability by September 30th, 1919, was already so far progressed as to be permanent."

See, also, U. S. v. Sligh, 31 Fed. (2d) 735.

It is, of course, impossible, we submit, for any physician to prognosticate the permanency of a disease in a patient without some constant contact with that patient, and observation over a period of time, and

to hold that an insured must prove absolutely the permanency of his disease at the date of its inception, without considering its progress thereafter, would be to deny the right of recovery in any case involving a germ disease; a person's resistive power to germ ailments will determine, in a large measure, the course of progress of such germ ailment, and that resistive power is not determinable without observation.

In reversing the trial judge, who had directed a verdict for the defendant in a War Risk case involving tuberculosis, in the case of Carter v. U. S., 49 Fed. (2d) 221, the court said:

> "And we think that under the evidence here the permanency, as well as the totality, of the disability was a question for the jury. A disability is permanent 'whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, and where there is substantial evidence of such condition it is for the jury to say whether or not the disability in fact exists. Of course not every case of tuberculosis constitutes a permanent disability, but, *where a case has been attended with as many distressing symptoms, a reasonable man might well conclude that it would continue throughout the life of the insured.*
>
> " 'In view of the arguments made before us in this and other cases, as to the weight to be

> given the testimony of physicians, we think it well to observe that whether a disability caused by disease be of a permanent character or not is to be determined not exclusively from the diagnosis made or the opinions given by physicans *at the time of the onset but by the history of the disease and all other evidence in the case. A disease causing total disability may be thought at first to be temporary in character, but if its subsequent history shows that it is reasonably certain to continue throughout the life of the insured it is to be deemed permanent within the meaning of the policy* * * * If the evidence taken as a whole is of such a character, when viewed in the light most favorable to the plaintiff, as reasonably to lead to the conclusion that he was totally and permanently disabled, the issue is for the jury, to be decided by them in the light of all the evidence, including the testimony of physicians.' " *Carter v. U. S.* (Italics ours).

In reversing the trial court which had directed a verdict for the defendant, the First Circuit Court of Appeals said, in the case of Kelly v. U. S., 49 Fed (2d) 897:

> "If the jury believed this evidence they could reasonably conclude that none would employ him continuously and that he could not successfully do any work for himself, and that *in view of the later history of his case this condition was permanent.*" *Kelly v. U. S.* (Italics ours).

The Circuit Court of Appeals for the Second Circuit, in the case of Glazow v. U. S., 50 Fed. (2d) 178, in reversing the trial court's judgment for the defendant, in a case involving tuberculosis, where the evidence showed pulmonary tuberculosis some time in 1919, and where it was testified by a specialist, who examined the plaintiff in 1923, that at the time he believed the plaintiff could not recover, the court said:

> "In this state of the proof the verdict should have been directed for the appellant, for he was totally and permanently disabled * * * when discharged." *Glazow v. U. S.*

We submit, therefore, that the history of the case, that is, its progress and development, subsequent to 1919 (and it is undisputed here that the plaintiff is now suffering from far advanced tuberculosis which is disabling him in a permanent and total degree), should be taken into consideration with the other evidence by the jury in determining whether said disability was permanent and total in character in 1919.

In support of its direction of the verdict for the defendant, the trial court quoted extensively from the case of Nicolay v. U. S., 51 Fed. (2d) 170. We submit that this was error, and that the Nicolay case is not parallel, for the following reasons: Evidence in the

Nicolay case showed symptoms of tuberculosis immediately on plaintiff's discharge from the service, but three years thereafter (1922) X-ray plates indicated chronic active tuberculosis of the left apex; but in 1923, the same doctor found tuberculosis to be inactive, from X-ray plates, and the plaintiff in that case was employed practically continuously from August, 1924, until the early summer of 1927. Compared with the history in the Nicolay case we have here a severe gassing in 1918, 4 or 5 months hospitalization from the effect of that gas, and influenza, the plaintiff being discharged out of the army a physical wreck, a year convalescing at home, with his mother and father, then bedfast, with the necessity of draining one lung, and a diagnosis of active pulmonary tuberculosis, with no steady work record at all from date of discharge to the present time.

The plaintiff here was in vocational training for periods, having each time been required to discontinue on acconut of his physical condition, from December, 1920, until some time in 1923, the last period of training being in Spokane, Washington, which training plaintiff voluntarily left to go to California, expecting a change of climate to benefit his health. (R. 16). Plaintiff's testimony will show that he was never able to follow training steadily on account of his health.

In the case of United States of America, Appellant, v. Robert H. Albano, Appellee, No. 6908, decided by this court on February 20, 1933, and in referring to vocational training in said opinion, this court said:

> "The appellant further contends that the $150 per month allowed to the appellee for the support of himself and his family during his vocational training period, of approixmately 19 months, should be included in the appellee's earnings. We do not believe that this is income in the sense used by the appellant. The allowance in question was for the maintenance of the appellee and his family during the time that he was in trainng, and we think that it has little or no bearing upon this case, one way or the other."

We submit that this rule is the only reasonable construction of the law in regard to vocational training.

Following 1923 when plaintiff discontinued vocational training, until the present time, we have no period of continuous work, if the evidence of plaintiff is to be believed.

The learned trial court, at least by inference, we submit, in directing the verdict for the defendant, holds that if plaintiff had followed the rules for tuberculars, and had rested without any attempt at work he might have recovered; that inasmuch as plaintiff at-

tempted vocational training and later attempted to work probably destroyed his own chances of recovery, and that this, as a matter of law, disputes the inference to be drawn from the history of his case that he was permanently and totally disabled at the time he was discharged from the army. We concede that such an inference might be drawn in weighing the facts, but that it should not be held to be a fact as a matter of law, but within the province of the jury to determine.

In the Sligh case (31 Fed. (2d) 735) the plaintiff worked, and by so doing may have precluded his chances for recovery, and this court did not bar him from recovering on that account.

In the Meserve case (44 Fed. (2d) 549) the plaintiff attempted to work, and in fact did work, and died, and this court did not hold that his beneficiaries were barred from recovery on his War Risk insurance policy.

On November 7, 1932, this court, in the case of U. S. v. Griswold (61 Fed. (2d) 583) said in the last paragraph of its opinion in said case, on page 586:

> "At the argument we were impressed that the case was controlled by the above-cited cases, but a study of the briefs and record convinces us that there was substantial evidence to go to the

> jury upon the proposition that although plaintiff actually worked for long periods of time, he was not then able to do so nor to do so continuously, and that the case is ruled by our decisions in U. S. v. Sligh, 31 F. (2d) 735; U. S. v. Meserve, 44 F. (2d) 549; U. S. v. Rasar, 45 F. (2d) 545."

It is true that in the instant case there were not a great number of witnesses for plaintiff; also that there were no doctors giving expert testimony who gave opinions of permanent and total disability from date of discharge. We desire to call to the court's attention the fact that both doctors appearing at the trial were Veterans Administration physicians. We submit that any case should not be decided according to the number of witnesses, and that one witness is sufficient to prove any fact, if said witness' testimony is given full credit; that the plaintiff is corroborated in practically everything he testified to, and that his testimony regarding the superficial examinations made by the government between 1920 and 1930 was not disputed, and if his testimony was untrue the defendant could have easily proved it by showing that said examinations were not superficial.

We direct the court's attention to the symptoms the plaintiff testified as having existed from the time he was gassed and had influenza, to the present time i. e., weakness, persistent coughing, expectoration of spu-

tum, pains in chest, nervousness, night sweats, and temperature, and we further direct the court's attention to Dr. Hobson's testimony, Veterans Administration employee since 1919, of the symptoms of active tuberculosis, i. e., loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, etc.; also to the fact that one with active tuberculosis is imperiling his life by working, as is expressed by both Drs. Hobson and Waller; and we respectfully submit that if plaintff's testimony is true, he had active tuberculosis all this period and by working did imperil his life and health.

We respectfully request this court to rule on the admission into evidence, over plaintiff's objections, of the alleged reports of physical examinations. Plaintiff was denied the right to inquire into the qualifications of said alleged examiners, of the nature and extent of the alleged examination, said defendant merely got into evidence self-serving declarations; and all it would have to do, if the court is sustained in admitting this evidence, would be to fill its file with alleged examination reports and not produce a single witness other than the custodian of the file, nor show any reason for not producing said examiners; and we further submit that said documents are not to be treated as those documents under a government seal, such as records of the War Department, etc.

CONCLUSION

We respectfully direct to the court's attention that the main question to be determined on this appeal is whether there was substantial evidence, and that it is neither the province nor the right of the court to weigh the evidence to determine its convincing force. U. S. Fidelity & Guaranty Co. v. Blake, 285 Fed. 449; that the subsequent history in plaintiff's case conclusively shows that his disability was permanent, and that such history is cogent evidence rightly which should be considered by the jury, and that the action of the trial court in directing a verdict for the government was an invasion of the plaintiff's right to a jury trial, and amounted in fact to a weighing of evidence and the determination of its convincing force in the mind of the trial court, rather than a determination of the fact whether or not any substantial evidence had been shown.

It is respectfully submitted that the trial court erred in directing a verdict and that this case should be reversed and remanded for a new trial.

Respectfully submitted,

SMITH, MAHAN & SMITH
Helena, Montana
HOWARD TOOLE
Missoula, Montana
W. E. MOORE
Missoula, Montana
Attorneys for Appellant.